No. 957

In the Supreme Court of the United States

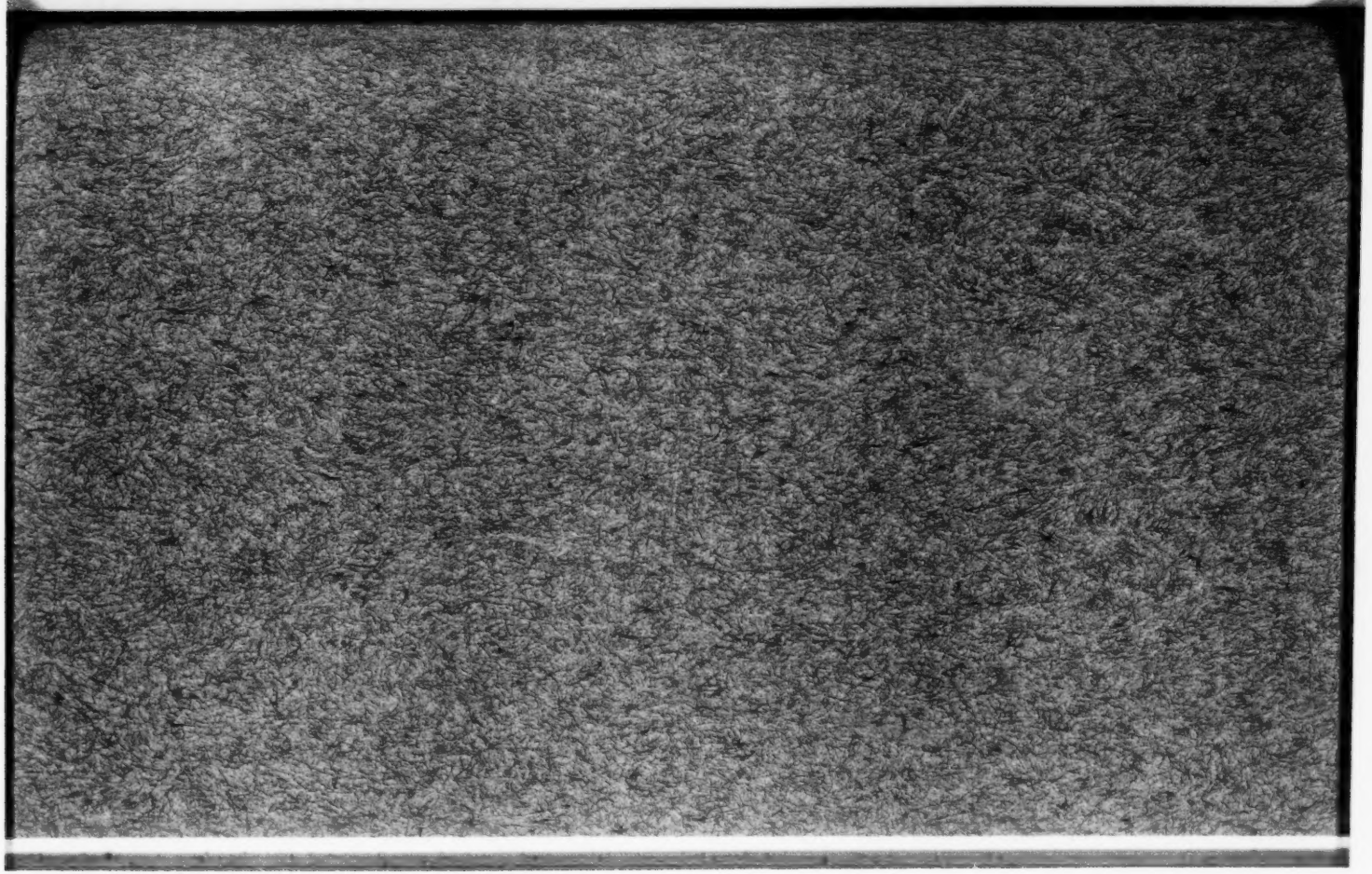
October Term, 1944

J. M. PECOTA, JR., AND [illegible],
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]



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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 957

J. M. PROCTOR, JR., AND ALMOND JAMES JONES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 122–124) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 15, 1944 (R. 124). A petition for rehearing (R. 125–135) was denied January 13, 1945 (R. 136). The petition for a writ of certiorari was filed February 17, 1945. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted for conspiracy to violate the Mann Act and also for substantive violations of the Act which were the objects of the conspiracy.

2. Whether the evidence is sufficient to support the convictions.

3. Whether the trial judge committed reversible error in the charge to the jury.

STATUTES INVOLVED

The Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On February 29, 1944, petitioners were indicted in three counts in the United States District Court for the Southern District of Texas (R. 3–8). Count 1 (R. 3–7) charged that petitioners unlawfully conspired from November 8, 1943, to November 15, 1943, to transport Doris Andrews and Eleanor Anderson from Houston, Texas, to New Orleans, Louisiana, for the purposes of prostitution, debauchery, and other immoral purposes, in violation of Section 37 of the Criminal Code. Nine overt acts were alleged to have been committed in pursuance of the conspiracy. Count 2 (R. 7) charged that on November 9, 1943, petitioners transported Doris Andrews from Houston, Texas, to New Orleans, Louisiana, for the purpose of prostitution, debauchery, and other immoral purposes, in violation of Section 2 of the Mann Act; count 3 (R. 7–8) charged a similar transpor-

tation of Eleanor Anderson. At their jury trial petitioners were convicted on all three counts (R. 10) and each was sentenced to imprisonment for a term of two years on count 1 and for terms of two years on each of counts 2 and 3, the latter sentences to run concurrently. The sentences on counts 2 and 3 were suspended for a period of five years, petitioners being placed on probation. (R. 11–14.) Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the judgments were affirmed (R. 122–124).

It was undisputed at the trial that petitioners and one McCutcheon transported the girls from Houston, Texas, to New Orleans, Louisiana. The principal issue concerned the purpose of the transportation. The Government's case rested principally on the testimony of Eleanor Anderson, two fifteen year old girls who were with petitioner Proctor in New Orleans, and statements signed by both petitioners prior to their arrests. Briefly summarized, the evidence showed that petitioner Proctor met Eleanor Anderson in Houston in October 1943 (R. 62); that she submitted to immoral relations with him on occasions prior to the transportation in question (R. 28, 63–64, 100); and that petitioner Jones and Doris Andrews had stayed at a Houston hotel for several weeks immediately prior to the transportation, having registered as man and wife (R. 40–41). On November 8, 1943, petitioners made plans to go

to New Orleans (R. 91) and both of them requested Eleanor to go with them (R. 63, 65). She testified that petitioners "bet me I wouldn't go and told me I was a piker" and that she understood that she was to be taken to New Orleans for the purpose of prostitution (R. 65). The other girl, Doris Andrews, was present during the conversation (R. 63), but the circumstances under which she was induced to go to New Orleans are not directly shown by the Government's evidence.[1] On November 9, 1943, petitioners, the girls, and one McCutcheon, drove in petitioner Proctor's automobile from Houston to New Orleans (R. 26, 32, 64, 97). When they arrived in New Orleans, petitioners registered at a hotel, registering the girls as their wives, and lived with them as man and wife (R. 26, 28, 32, 47–49, 100). They remained in New Orleans for four days and the girls practiced prostitution during three of the four nights they were there (R. 68, 74–75). They left New Orleans after police had visited Proctor's hotel room as a result of an altercation in the room (see R. 26–27, 33, 75, 77–78).

The scheme by which the practice of prostitution was carried on consisted in petitioners remaining in the hotel rooms with the girls. When a bell boy at the hotel secured a customer, he came to the room and one of the girls was sent out with

[1] Doris married petitioner Jones prior to the trial (R. 35) and did not testify.

the bell boy (R. 67–68, 69, 73–74). Eleanor testified that she earned about thirty-four dollars in New Orleans, which she gave to Proctor (R. 68–69). When they returned to Houston, Proctor gave her one dollar (R. 79).

While in New Orleans Proctor and McCutcheon observed two fifteen year old girls who lived in the neighborhood of the hotel. After talking to them, the girls went with Proctor and McCutcheon to Proctor's hotel room and while the girls were there Proctor and McCutcheon asked them "to prostitute for them." (R. 58; see R. 50–52, 54, 79–82.) One of the girls testified that while they were in the room she overheard Proctor and McCutcheon talking of the money they were securing from the prostitution activities of Doris and Eleanor (R. 56).

Petitioner Proctor, testifying in his own defense, admitted the transportation, but claimed that both he and Jones went to New Orleans for business reasons and not for the purpose of prostituting the girls, and that Doris and Eleanor did not practice prostitution in New Orleans (R. 90, 101–102). Petitioner Jones did not take the stand.

ARGUMENT

1. Relying on the doctrine that if an executed crime necessarily involves the mutual cooperation of two persons, they may not be convicted for conspiracy to commit the crime (*United States* v. *Zeuli,* 137 F. 2d 845 (C. C. A. 2); see *United*

States v. *Katz*, 271 U. S. 354; *Gebardi* v. *United States*, 287 U. S. 112, 122; cf. *United States* v. *Loew*, 145 F. 2d 332, 333 (C. C. A. 2)), petitioners urge (Pet. 2, 5–6, 11–14) that the substantive offenses with which they were charged "necessarily involved mutual cooperation and could not be committed by one of the petitioners alone" (Pet. 13) and that they were therefore improperly convicted under the conspiracy count. This contention, we submit, is without merit.

The foundation for the application of the doctrine upon which petitioners' contention is predicated is the fact that the substantive offense is, for practical purposes, the same as the conspiracy offense, because action in concert is an element of the substantive offense, such as, for example, adultery. That foundation is here totally lacking. The substantive offenses charged in counts 2 and 3 were the transportation of the girls in interstate commerce for the purpose of prostitution, in violation of Section 2 of the Mann Act (*supra*, p. 2). The crime denounced by Section 2, however, does not include as one of its elements the requirement that two or more persons must act in concert in transporting a girl in interstate commerce for the purpose of prostitution. There can be no question that a person acting singly may be convicted for such a transportation. It is equally clear that either of petitioners might have been convicted on the substantive counts, while the other was

acquitted, a situation which could not exist if the joint action of both was necessary to the commission of the substantive offenses. Accordingly, we think it plain that the doctrine upon which petitioners rely is inapplicable to this case. It is to be noted in this respect that this case is unlike *Gebardi* v. *United States,* 287 U. S. 112, for the girls who were transported are not named as conspirators; petitioners are the only conspirators named in count 1.

If petitioners' argument may be viewed as suggesting that aside from the doctrine referred to above, they may not be punished for conspiracy to commit the substantive offenses for which they were also convicted, we submit that this argument, too, is without merit. It has long been recognized that a conspiracy is a separate offense from the substantive crime which is its object (*United States* v. *Rabinowich,* 238 U. S. 78) and convictions for both conspiracy and the substantive offenses have been upheld by this Court (see *United States* v. *Hirsch,* 100 U. S. 33; *Carter* v. *McClaughry,* 183 U. S. 365) and by the lower federal courts. *United States* v. *Wexler,* 79 F. 2d 526 (C. C. A. 2), certiorari denied, 297 U. S. 703; *Sneed* v. *United States,* 298 Fed. 911 (C. C. A. 5), certiorari denied, 265 U. S. 590; *Westfall* v. *United States,* 20 F. 2d 604 (C. C. A. 6); *Holmes* v. *United States,* 134 F. 2d 125 (C. C. A. 8), cer-

tiorari denied, 319 U. S. 776; *Curtis* v. *United States,* 67 F. 2d 943 (C. C. A. 10); cf. *Krench* v. *United States,* 42 F. 2d 354 (C. C. A. 6).

2. Petitioners' contention (Pet. 3, 6–7, 15–19) that the evidence is insufficient to support their convictions rests principally on the ground that the evidence which they adduced showed that the transportation was for a legitimate business purpose and not for the purpose of prostitution. This argument overlooks the fact that the evidence for the Government and petitioners' evidence was sharply conflicting and that an issue of credibility was thus presented for resolution by the jury. The jury's verdict demonstrates that it disbelieved petitioners' story and accepted the Government's evidence.

The Government's evidence (*supra,* pp. 4–6) showed that petitioners had engaged in immoral relations with the girls in Houston; that prior to November 9, 1943, petitioners planned a trip to New Orleans; that they induced the girls to accompany them; that at least one of the girls understood that she was being taken to New Orleans for the purpose of prostitution; that the girls were transported to New Orleans in petitioner Proctor's automobile; that in New Orleans petitioners immediately obtained hotel quarters, registering the girls as their wives and living with them as man and wife; that on the first day of their arrival the girls commenced the practice of prostitution in

petitioners' presence, and, we think it a fair inference, as a result of arrangements made by petitioners with bell boys in the hotel; that while in New Orleans petitioner Proctor sought to induce other girls to work as prostitutes; and that the earnings of at least one of the girls went to petitioner Proctor. From this evidence the jury, we submit, was entitled to find that the transportation of the girls to New Orleans was planned by petitioners for the purpose of putting them to work as prostitutes for petitioners' profit, and that pursuant to their unlawful plan petitioners transported the girls to New Orleans, both with a view to committing immoral acts with them and for the dominant purpose of prostituting them. In the words of the court below (R. 124), "when the evidence is measured to the definition of conspiracy and to the substantive offenses charged in the two additional counts, it becomes manifest that the jury was warranted in finding the defendants guilty as charged on all three counts of the indictment."

3. Finally, petitioners urge (Pet. 3–4, 7, 19–27) that the trial judge committed reversible error in his charge to the jury. Specifically, petitioners complain that the court did not instruct the jury on the law of circumstantial evidence and that the court erroneously instructed the jury concerning its function in determining the credibility of the witnesses. This contention, when ap-

praised in the light of the charge as a whole, is without substance.

In instructing the jury (R. 112–117), the trial judge summarized the charges against petitioners; he discussed the presumption of innocence and the meaning of reasonable doubt; he instructed the jury that it was the sole judge of the facts and the credibility of the witnesses; he made clear the distinction between the conspiracy charge and the substantive charges; and he advised the jury that the fact that petitioner Jones did not take the stand was not to be considered by the jury. At this point counsel for petitioner Jones requested "a charge on circumstantial evidence with reference to any prostitution on the part of Doris Andrews" (R. 116). The court immediately instructed the jury that "you can infer or deduct or reason that from certain facts other facts are arrived at, and, of course if you do go into the question of circumstantial evidence, you must find that by the same formula that I have given you with reference to reasonable doubt" (R. 116). The formula concerning reasonable doubt which the court gave the jury was as follows (R. 113):

> * * * Now, "beyond a reasonable doubt" is a phrase that you often hear and it, too, in its simplest analysis is rather plain and clear. It simply means a real doubt or a substantial doubt. Looking at it from another angle, it simply means that taking all the testimony, considering it, analyzing it, and

> comparing it, if you then have a reasonable doubt as to the guilt or innocence of a defendant, it becomes your duty to resolve that doubt in favor of the defendant and say by your verdict "not guilty." But on the other hand, if after a careful consideration of the testimony, analyzing it and comparing it, you do not have a doubt in your mind that is reasonable, that is substantial, that is real, then it equally becomes your duty to say by your verdict on that particular count, "The defendant is guilty, * * *."

It may be conceded that the instruction relating to circumstantial evidence was not a model one, but we believe that it was adequate, especially when it is noted that petitioners did not submit a requested instruction to the court. Rather, after the general charge had been completed, counsel for Jones merely stated that he desired the court to give "a charge on circumstantial evidence." After the court complied with the request and gave the charge, counsel did not direct the court's attention to any defect in it or suggest any other language which would better convey the point to the jury. In these circumstances, bearing in mind the direct evidence showing petitioners' guilt, we do not believe that the instruction constituted reversible error.

Similarly, petitioners argue (Pet. 22) that the charge to the jury concerning its function in de-

termining the credibility of the witnesses operated to permit the jury to disregard testimony of defense witnesses. On this question, the court charged the jury as follows (R. 113–114):

> * * * Now, you Gentlemen of the Jury are the sole judges of the facts. The question of punishment if punishment there be, is not for you to take into consideration. That is a function of the Court in a criminal trial in the Federal Court such as this. You are the exclusive judges of the facts proved, the credibility of the witnesses, and of the weight to be given to their testimony. Amplifying that simply means that you gentlemen are the ones to judge who told the truth, whether they told the truth completely or whether they told half the truth, whether part of the testimony is to be believed, whether any part of it is to be believed or whether the testimony in toto is to be believed. * * *

Plainly, the court conveyed to the jury the fact that it was the sole judge of the credibility of the witnesses and that it was entitled to disregard such testimony as it disbelieved. Petitioners did not except to the charge in this respect nor in any manner indicate any disapproval of it. Obviously the instruction was not directed at petitioners' witnesses alone; it was applicable to all the witnesses and there is nothing to indicate that the jury did not so understand it.

CONCLUSION

The case presents no conflict of decisions or important issue of law, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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